IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR PETITIONER

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INDEX

Cases Cited

Text

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REPLY FOR PETITIONER

A grant of certiorari should not be limited to Questions 1 and 2, as suggested by respondent. The four other questions presented are also of importance and have been wrongly decided below. Two of these were accepted by the Court in its grant of certiorari in this case at the 1954 Term (349 U. S. 843). Cf. present Ques-

tions 3 and 6 with Questions 7 and 2, respectively, in Petition in No. 718, Oct. Term, 1954. Respondent's opposition to review of these questions is inconsistent with its statement that it does not oppose certiorari on Questions 1 and 2 because these "are substantially the same as those presented by [petitioner] in the former petition in the 1954 Term" (Mem. 7-8).

I. The sufficency of the evidence (Question 3)

The cases cited by respondent stand for the proposition that the Court will not overturn a Court of Appeals decision reviewing an administrative determination of fact if the Court of Appeals made a "fair assessment" of the record. *Pearifoy* v. *Commissioner*, 358 U. S. 59, 61, and other cases cited Mem. 9. But the same cases demonstrate that in an important controversy the Court will grant certiorari on a sufficiency-of-the-evidence question in order to determine whether the court below *did* fairly assess the record.

There can be no doubt as to the importance of this case in terms of its immediate and far-reaching consequences, the magnitude of the legal issues, and its effect on the nation's international repute. For reasons to which we will soon allude, there is ample reason to believe that the court below did not fairly assess the record, and this in a case where the utmost caution was necessary to insure that the decisional process would not be affected by the prevalent animus against petitioner. Nor should the Court so confine review as to require an unnecessary decision of the intricate constitutional issues in the case.

It was for these reasons, we believe, that when the Court granted certiorari in this case in the October,

1954 Term, it did not exclude review of the sufficiency of the evidence or otherwise limit the writ.

There is no more reason now than in the 1954 Term for the Court to be deterred by respondent's ominous references to the size of the administrative record (Mem. 9). It is as true now as it was then that a study of the hearing record is unnecessary to determine the evidence issue. The issue can be resolved from the opinion below and the Second Modified Report of the Board. For this reason the evidentiary discussion in our petition has almost without exception accepted the Board's evidentiary findings, loaded though they are. Our approach has been to show that these findings do not support the Board's intermediate and ultimate findings.[1]

[1] The last opinion of the court below summarized the evidence against petitioner in a paragraph (R. 2842; Pet. App. 134; quoted in Pet. 17-18). This summary clearly shows that the court did not fairly assess the record, that it misunderstood the requirements of the Act, and that the Board's order is not supported by the evidence.

Under the Act an organization may not be found to be a Communist-action organization unless the preponderance of the evidence establishes, inter alia, that at the time of the administrative proceeding the organization (1) is under Soviet control, and (2) operates

[1] It is also true that the hearing record was artificially swollen by the indiscriminate admission of thoroughly remote and irrelevant evidence offered by the Attorney General. This explains why, despite the "14,000 pages of testimony" (Mem. 9), the Modified Report acknowledged that "the really vital part of [the Attorney General's] case is documentary evidence which to a considerable extent needs relatively little oral illumination" (R. 2409, fn. 2). The unstricken testimony selected for printing occupies approximately 900 printed pages.

to advance the seditious objectives attributed by section 2 of the Act to the world Communist movement. Neither of these components can be derived from the court's summary, which states only the following: (1) that before 1940, petitioner was a member of the Communist International and has not since repudiated the International's objectives or methods; (2) that petitioner "is *by its own choice* named the Communist Party of the United States of America" (emphasis added); (3) that petitioner reorganized itself in 1945 after criticism of its policies by a French Communist; and (4) that petitioner agrees with "the program and policy of the Communist Party abroad." Nothing is said in the summary, and nothing could be said, that at any time after 1940 petitioner received foreign directives or supervision—though these are indispensable elements of foreign control (Pet. 49)—or that petitioner advances seditious objectives.

The fact is that the court below thought it had fulfilled its obligation to review the facts when it found what was never disputed—that petitioner believes in Communist principles and agrees with Soviet views. Bemused by the popular sterotypes of Communism, the court thought that foreign control and the advancement of seditious objectives are inevitable ingredients of Communism, and that no other proof was required. It revealed this attitude in the next paragraph when it explained: "One who attaches himself by intellectual affiliation to a cause, assumes the name of the cause, puts on the habiliments of the cause, and adheres to the course of the cause is not mistreated if it be inferred *prima facie* he is part of the cause" (Pet. App. 131-32).

But an assessment of the evidence to determine whether petitioner adheres to the cause of Communism is not a fair assessment to determine whether petitioner is under foreign control and operates to advance the seditious objectives described in section 2.

Respondent's "brief review of important parts of the evidence" (Mem. 9) likewise demonstrates the vacuity of the evidence against petitioner. The selected parts consist of a hotchpotch of obsolete and immaterial matters, such as that in 1934 a Communist wrote that the Soviet Communist Party had a leading role in the Comintern (Mem. 10); that before 1940 petitioner belonged to the Communist International, now long defunct (Mem. 11); that petitioner believes in the doctrines contained in Communist writings (Mem. 12); that the Daily Worker had a correspondent in Moscow (Mem. 13, ftn. 8); and that petitioner agrees with Soviet foreign policy (Mem. 13-14). Unable to cite any evidence of Soviet directions or supervision, respondent is compelled to dilute "control" into the meaningless concept that it "implies a prediction that the Party, the entity controlled, will act in the future in accordance with the leadership of the Soviet Union" (Mem. 11). Unable to cite evidence that respondent incites violence, respondent asserts (without documentation) that petitioner would do so "if deemed necessary" in some future hypothetical situation (Mem. 16, ftn. 11). Respondent also states that "the theory of the world Communist movement, as amply revealed by the record" is that each national Communist Party will lead the proletariat of its country "under the direction and control of the Soviet Union" (*ibid.*). But again it cites no evidence in support of its say-so, and there is no such finding in the Second Modified Report.

With regard to the criteria of section 13(c), respondent states that the "Board made specific findings of the extent to which petitioner met all of these criteria and the court below held that all subsidiary findings were supported by a preponderance of the evidence in all but one instance" (Mem. 13). This disingenuously omits reference to the nature of and support for the 13(c) findings which were sustained. The situation with regard to the seven findings left after the court below struck that on "secret practices" is explained in our petition and is not controverted by respondent. It is as follows: (1) the findings on "financial aid" and "instruction and training" are favorable to petitioner; (2) the partially unfavorable findings on "reporting" and "directives and policies" are negated by the Board's own evidentiary findings; (3) the adverse finding on "discipline" is contradicted by the Board's evidentiary findings; (4) the adverse finding on "non-deviation" is based on a welter of illogical theories; (5) the adverse finding on "allegiance" is based on a view of Marxist writings incompatible with *Schneiderman* v. *United States*, 320 U.S. 118. (Pet. 14-17, 55-57.)

That the court below did not fairly assess the record also appears from its handling of the concept of foreign "control." In its original opinion, the court held the evidence sufficient without giving any interpretation of the term "control." In its second opinion, after petitioner pointed out that there was no evidence of any means by which the Soviet Union could or did exert compulsion on petitioner, the court explained (we think wrongly) that "control" includes a *voluntary* following of Soviet directions (Pet. App. 94). On the third review, accordingly, petitioner empha-

sized that there was no evidence or Board findings of any Soviet directions after 1940 which petitioner could follow, even voluntarily. The answer supplied by the third opinion was that "control" is satisfied by nothing more than adherence to the "cause of Communism" out of "intellectual affiliation" (Pet. App. 131-32).[2]

It is likewise clear that the court below did not make a fair assessment of the evidence on the "objectives" component of the section 3(3) definition. In its first opinion, the only references to "objectives" were repeated statements that the ultimate objective of Communism is a "classless, stateless world" (Pet. App. 60, 66, 67). Obviously, that objective does not correspond to the seditious objectives which section 2 attributes to the world Communist movement and which section 3(3) incorporates into the definition of a Communist-action organization. The language of the second opinion, decided January 9, 1958, stated that the evidence and findings on the objective component were sufficient (Pet. App. 94-95). But the court itself later denied that it had made such a determination. For in its explanatory memorandum of April 11, 1958, the court stated that its second de-

[2] It is misleading for respondent to say (Mem. 8) that the court below "made a painstaking and exhaustive review of the evidence" on "the three occasions" the case was before it. The court below itself stated in its explanatory memorandum of April 11, 1958 that it did not intend on its second review to affirm the Board's findings (Pet. App. 123). The court's first review was based on a record which contained large quantities of evidence which was thereafter stricken or discredited by the Board (Pet. 12). On the final review, the court's discussion of the evidence consisted of one paragraph (Pet. App. 131, quoted Pet. 17-18), plus one sentence asserting that "we have examined the Modified Report [not the evidence] in the light of these averments and think the findings are amply sufficient" (Pet. App. 125).

cision "certainly did not intend to affirm" the Board's findings of fact. (Pet. App. 123). And the summary of the evidence in its final opinion, as we have seen, contains nothing to indicate that petitioner advances seditious objectives.

II. The refusal to strike all of Budenz' testimony because of his unavailability for cross-examination (Question 4)

As respondent recognizes (Mem. 19), the consequence of a deprivation of cross-examination because of the death or illness of a witness has never been determined by the Court. Both respondent and petitioner cite (Mem. 20; Pet. 65-66) the statement on the subject in 5 *Wigmore, Evidence* (3rd ed.) sec. 1390. Wigmore says that all of the testimony of the witness must be stricken (1) if the party who called him had "responsibility of any sort" for the deprivation or (2) if the loss of cross-examination is a material loss.

1. Respondent ignores petitioner's showing (Pet. 66) that the Attorney General was responsible for the deprivation because he failed to disclose the FBI's possession of the Budenz statements until it was too late to recall the witness for cross-examination. This failure is alone sufficient under the Wigmore rule to require striking all of the testimony of the witness.

Petitioner showed (Pet. 66) that the Attorney General and the Board were responsible for the deprivation of cross-examination for the further reason that the objections of the former and the rulings of the latter denied petitioner access to the Budenz statements until the witness became unavailable. Respondent argues (Mem. 21, ftn. 15) that neither the Attorney General nor the Board are responsible for the conse-

quence of their actions because the objections and the rulings "had at that time respectable, and perhaps majority, support in the reported cases." This statement is inaccurate.[3] But even if it were true, it would not absolve the Attorney General and the Board from responsibility for the error. It would be obviously unfair to prejudice one party because of the other party's mistake, even if the mistake were made in good faith. And where it is uncertain whether prejudice has resulted, fairness requires that the doubt be resolved against the party making the mistake. This is the whole point of the rule that where, in Wigmore's words, the tendering party has "responsibility of any sort" for the deprivation of cross-examination, all of the witness' testimony must be stricken without the need for showing that the deprivation was a material loss.

2. Respondent argues (Mem. 19-21) that the deprivation of cross-examination was not a material loss to petitioner because the witness had already been cross-examined at length. Obviously, however, lengthy cross-examination without the aid of relevant prior statements is no substitute for cross-examination once the statements have been supplied. Nor may the de-

[3] Prior to *Jencks* v. *United States*, 353 U. S. 657, the commonly held view was that the prior statements of a witness must be produced to the tribunal and made available to the cross-examiner if *in camera* inspection showed that they were inconsistent with the testimony. See e.g., *United States* v. *Krulewich*, 145 F. 2d 76; *United States* v. *Simonds*, 148 F. 2d 177; *United States* v. *De Normand*, 149 F. 2d 622; *Boehm* v. *United States*, 123 F. 2d 791; *Crosby* v. *Pacific S. S. Lines*, 133 F. 2d 470; *United States* v. *Schneiderman*, 106 F. Supp. 731; *United States* v. *Lebron*, 222 F. 2d 531. Yet the Attorney General objected to petitioner's motions for *in camera* inspection of the Budenz statements, and the Board sustained him (R. 2187-89, 2217, 2225).

trial of cross-examination with the aid of the prior statements be justified by respondent's speculation (Mem. 20-21) that such examination would not have resulted in impeaching the witness. *Jencks* v. *United States*, 353 U. S. 657, 688-89; *Gordon* v. *United States*, 344 U. S. 414, 420-21; *United States* v. *Zborowski*, 271 F. 2d 661, 667. Furthermore, Budenz' prior statements indicate a strong likelihood that his testimony on the Starobin and Weiner matters was concocted (Pet. 67-68).

Respondent argues (Mem. 20-21) that "there is no sufficient basis in the case for believing that further cross-examination of Budenz as to the Starobin and Childs-Weiner matters would reveal perjury as to the *non-stricken* testimony" (emphasis supplied). This misconceives petitioner's contention. Our complaint is that the deprivation of cross-examination on the Starobin and Weiner matters with the aid of Budenz' prior statements denied petitioner the opportunity of showing that his testimony on *those matters* was false. Such a showing would, at a minimum, have seriously impaired the credibility of his testimony on other matters and might well have required striking it as tainted: *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115. The loss of the opportunity to make such a showing was a material loss within the rule as stated by Wigmore.

The correctness of the principles stated by Wigmore and the application of those principles to the facts of this case present novel questions of general importance to the administration of justice which plainly require review.

III. The refusal to order the production of relevant prior statements of witnesses for the Attorney General (Question 5)

A. *The Gitlow memoranda*

1. Petitioner urged (Pet. 70) that the court below misapplied *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U. S. 197, in holding that the exclusive remedy for the Board's refusal to order production of the Gitlow memoranda was by a motion for leave to adduce them as additional evidence pursuant to section 14 of the Act. Respondent sees "no basis" for this contention (Mem. 22). But the court below thought otherwise. The majority stated that petitioner's argument "is not unreasonable" (Pet. App. 103); and Judge Bazelon held (Pet. App. 121) that the refusal to order production of the Gitlow memoranda was erroneous. Furthermore, the majority recognized (Pet. App. 102) that its ruling was contrary to a decision of the Eighth Circuit and imposed the cumbersome requirement of multiple interlocutory appeals to secure review of the exclusionary rulings of administrative agencies which operate under standard statutory review provisions. All of these considerations underscore the need for the Court to determine whether the court below rightly extended *Consolidated Edison* by applying it to a ruling denying production of documents for use in cross-examination (see Pet. 70). Moreover, the rule in *Consolidated Edison*, even if limited to the situation there involved, is sufficiently doubtful to warrant reconsideration.

2. Petitioner urged (Pet. 69-70) that even if the majority below correctly applied *Consolidated Edison*, there was no justification for denying the relief sought by petitioner when, in compliance with the court's

ruling, petitioner moved for leave to adduce the Gitlow memoranda as additional evidence. Respondent's only reply to our contention that the court's action violated accepted standards of fair play is the *ipse dixit* that the ruling was "amply justified" (Mem. 22).

3. Respondent contends (Mem. 24) that petitioner's demand for the Gitlow memoranda was over-broad because it was not limited to the portions relating to matters about which the witness had testified. But neither the Board nor the court below assigned this as a ground for refusing to order production of the memoranda. Petitioner, therefore, was not accorded a fair opportunity to make a more limited demand before the Board. Moreover, petitioner's motion for leave to adduce additional evidence was limited to those portions of the memoranda which related to the subject matters of Gitlow's testimony (R. 2797). Finally, even if petitioner's original demand was too broad, that would not justify the denial of production of those portions of the memoranda to which it was entitled.

B. *The Budenz statements*

The majority below, Judge Bazelon dissenting, ruled that petitioner was not entitled to statements of Budenz other than those relevant to the Starobin and Weiner matters because petitioner did not demand them at the hearing (R. 2831-32; Mem. 25). Respondent apparently concedes that such a demand was not required if the Board had, by prior rulings, established the principle that a witness' statements were producible only upon a showing of inconsistency. Respondent asserts, however, that the record does not support our

statement that the Board had established such a principle. (Mem. 24-25.)

This assertion is wrong. As respondent acknowledges (Mem. 25), the Board denied production of the memoranda of the first witness, Gitlow, on the ground that "the record fails to disclose any factual situation justifying the granting of the [motion]" (Tr. 2886). What respondent overlooks is that the "factual situation" referred to in this ruling was stated by the Board in an opinion denying another production motion made before Budenz' appearance on the stand. This opinion shows that in the Board's view the "factual situation" prerequisite to production was one in which the cross-examiner had established an inconsistency between the witness' testimony and his statement. The Board's opinion stated (Tr. 12659-60):

> "The [petitioner] heretofore has sought compulsory production of documents and memoranda from the witness Gitlow which had been turned over to the FBI, raising substantially the same contentions as here advanced, but the motion was denied on May 15, 1951. We see no reason for changing this ruli[illegible].
>
> "As stated in Gi[illegible]man v. United States, mentioned earlier, it is 'the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced or to inspect them.' United States v. Krulewich, reported in 145 Fed. 2d at 76, Circuit Cou[illegible] Case Second Circuit 1944, is in no way contrary to the foregoing conclusion, since in that case the witness' cross-examination revealed that she had made an inconsistent prior statement to the FBI . . . .
>
> "Here there is no showing that anything contained in the documents sought would in any way

serve to contradict or impeach the witness Baldwin's testimony.

"Hence the [petitioner's] motion is denied. . . ."

Plainly, this ruling relieved petitioner of the obligation of making fruitless motions for the production of prior statements by Budenz which it could not show were inconsistent with his testimony. Accordingly, the failure to make such motions did not preclude petitioner from access to the Budenz statements when it moved for their production after this Court's decision in *Jencks*.

C. The prior statements of other witnesses

Respondent's only reply to petitioner's argument (Pet. 72-73) that it was entitled to production of the relevant FBI statements of all other witnesses for the Attorney General is that the argument rests on "the factually erroneous contention that, having been denied production of the Gitlow memoranda at the original hearing, petitioner did not make the demands in respect to subsequent witnesses because it considered that such demands would have been 'fruitless'" (Mem. 26). As we have just shown, however, petitioner is factually correct, and it is respondent which is in error.

IV. The findings on "secret practices" (Question 6)

Respondent urges that the striking of the secrecy finding did not require a remand because the finding was "of minor importance and separable," so that "it is clear that the Board's order would have been the same" if the finding had been omitted (Mem. 27). This impliedly concedes that if the finding was important the court below erred in refusing to remand.

It is clear that the Board did consider the secrecy finding to be of major importance. It insisted on retaining the finding after the court below had held on its first review that the finding was not supported by the evidence (Pet. 73-74). The Board did so although it knew from the preceding litigation that retention of the finding would create a substantial question as to the necessity for a remand.[4] Furthermore, the Board refrained from stating that this doubtful finding was not essential to the result. The assertion now made in respondent's Memorandum as a litigation tactic obviously is contrary to the action of the Board in its quasi-judicial capacity.

Respondent deprecates the secrecy finding on the ground that it "went only to . . . one of the eight standards or criteria found in Section 13(e)" (Mem. 27). The fact that "secret practices" was one of the criteria laid down in the Act indicates that it is of major importance, and one out of eight would not be an insignificant proportion even if all of the 13(e) findings had been adverse to petitioner. In fact, two of the 13(e) findings were favorable to petitioner, and the remaining are based on remote evidence and misinterpretations (see *supra*, p. 6, and Pet. 14-17, 55-57).

[4] One of the questions on which the Court granted certiorari at the 1954 Term was: "2. Whether the court below, having stricken two of the key findings [i.e. on "reporting" and "secret practices"] on which the Board based its order, erred in failing to remand the proceeding for administrative redetermination." (Petition in No. 718, Oct. Term, 1954, p. 3.) The Board's Modified Report acceded to the holding of the court below that its finding on "reporting" was not supported (cf. Pet. App. 72 with R. 2583). The contrast in its refusal to yield on the "secret practices" finding emphasizes the importance which the Board attached to the subject.

Under the circumstances, it would be thoroughly inconsistent with the *Chenery* doctrine (Pet. 74) for the Court to decide what the Board refuse to decide—that the "secret practices" finding was not important to the result.

As we have seen, the question under discussion was included in the questions which the Court accepted for review in the petition at the 1954 Term. The importance of the question and the probability of error below have not diminished.

Respectfully submitted,

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